Tutorial Letter 201/2/2012

Law of Succession

PVL2602

Semester 2

Department of Private Law

This tutorial letter contains important information about the assignments and the examination

Bar code

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Dear Student

1 COMMMENTARY ON ASSIGNMENT 01: SEMESTER 02

This assignment covers chapters 1 to 6 of the textbook as well as the information in Tutorial Letter 101.

Question 1

In May 2007, John and William entered into a civil union (in terms of the Civil Union Act 17 of 2006) that was out of community of property, but subject to the accrual system. In January 2008, John died intestate and left the following relatives:

- William, who is entitled to R100 000 as accrual;
- Samuel and Dina, the adopted children of John and William (Dina refuses to inherit any part of John's estate);
- Frans, the grandson of John (Frans is the son of John's predeceased son, Gerald who was born from John's first marriage to Kathy);
- Mary, John's mother;
- Ben, John's brother.

The total value of John's estate is R900 000. Calculate how his estate is going to devolve and indicate how much each person will receive. Give reasons for your calculations. Also indicate which relatives will not inherit, giving reasons. (15)

ANSWER:

[Please note: Information in square brackets provides further explanation and need not have formed part of your answer.]

(1) William is entitled to R100 000 as accrual in terms of matrimonial property law; this amount is subtracted from John's estate: R900 000 – R 100 000 = R800 000 (1)

[**NOTE:** You would have received a mark of 0 for the entire question if you divided the estate in half in terms of a marriage in of community of property as this marriage was concluded out of community of property. Note further that the accrual is **deducted** from John's deceased estate because **William** is entitled to accrual. John's estate has to pay the accrual to William. If **John** was entitled to accrual, the accrual would have been added to John's estate.]

(2) The total value of John's estate to be divided in terms of intestate succession law: R 800 000.
(1)

(3) William is entitled to inherit **either** a child's portion **or** a statutory determined minimum amount of R125 000, whichever is the most (s 1(1)(c)). (1)
(4) A child's portion is calculated as follows: the value of the estate is divided by the number of children (1)
(5) who have either survived the deceased (1)
(6) as well as the children who have predeceased him but are survived by descendants, (1)
(7) plus the number of spouses (one in this instance). (1)

[If you did not give the correct definition of the calculation of a child's portion *in toto,* you would not have received any marks – that is, 0/4. Note that a child's portion is NOT calculated by simply dividing the value of the estate by the number of children plus the number of spouses – the calculation has four elements.]

(8) A child's portion = R800 000 divided by 4 (S, D, G + 1) = R 200 000. (1) (Although D repudiated, she has to be counted for purposes of determining a child's portion.)
(9) Thus a child's portion (R200 000) is more than R125 000; therefore W inherits a child's portion of R200 000 (1).
(10) The remaining R600 000 (R 800 000 – R 200 000) has to be divided equally between the 3 children S, D and G (1) = R 200 000 each
(11) but because G is predeceased his share of R 200 000 will go to W's grandson F (1)
(12) by way of representation. (1)
(13) D refuses to inherit, consequently her share of R 200 000 must go to W in terms of section 1(6) of the Intestate Succession Act (1)
(14) which provides that if a descendant refuses to inherit, his/her share goes to the spouse.(1)
(15) M and B inherit nothing because M is an ascendant and B is a relative in the collateral line; there are closer relatives who exclude them. (1)

Question 2

T committed suicide on 10 December 2011. He left a letter in which he wrote that he revokes all previous wills and leaves all his possessions to his two children from his first marriage, S and D. This is only signed with T's signature. It appears that T executed a valid will in 2003 in which he left all his possessions to his second wife and nothing to his children. S and D approach you for advice. They want to know what their position with regard to any inheritance is. Explain fully any possible action available to them. (15)

ANSWER:

The letter that T left behind is not is not a valid will because it does not comply with the formalities in terms of section 2(1)(a)(ii) of the Wills Act 7 of 1953.(1) The letter was signed only by T and not also by two competent witnesses in the presence of each other and in the presence of the testator.(1) As a result the second wife will inherit the entire estate in terms of the valid second will and S and D will inherit nothing.

S and D will have to bring a court application in terms of section 2(3) for the court to order the Master to accept the second will as the testator's will. (1) In terms of section 2(3) the court is empowered to order the Master to accept a document as a valid will if the court is satisfied that the document concerned was drafted or executed by a person, (1) who has since died (1) and who intended that document to be his or her will (1), although it does not comply with all the

formalities for the execution of wills. The court is obliged to give the order if it is satisfied that the testator intended the document to be his will. (1)

The first requirement, namely that the document concerned must have been **drafted or executed** by a person who has since died, caused interpretation problems. The question was whether it means that the deceased had to **personally** draft the document. (1) At first the courts followed a contradictory approach. In *Webster v The Master* 1996 (1) SA 34 (D) (1) the court held that the wording indicated that section 2(3) calls for conduct of the testator personally, and does not encompass conduct through an agent.(1) This is called the strict approach and was followed in a few cases (see ***Jamneck & Rautenbach*** at 79).

A flexible approach to section 2(3) was, however, followed in *Back v Master of the Supreme Court* [1996] 2 All SA 161 (C) (1) in which the court held that the requirement of a document 'drafted' by the deceased must be flexibly interpreted in view of the purpose of section 2(3), which was to prevent the testator's wishes from being nullified by non-compliance with technical formalities. The court decided that there is nothing in section 2(3) to indicate that the testator has to draft the document personally and that there must be very few people who still write out a will by hand. (1)

Finally, in *Bekker v Naude* 2003 (5) SA 173 (SCA), (1) the Supreme Court of Appeal settled the differences of opinion that existed regarding the interpretation that should be given to the word "drafted" in section 2(3) of the Wills Act 7 of 1953. The Supreme Court of Appeal preferred the narrow interpretation in terms of which the testator should have personally (1) drafted the document. The court came to this conclusion based on the basic principle of interpretation of a statute that the ordinary, grammatical meaning of a word must be used unless that would lead to absurdity, inconsistency, or hardship, or result in an anomaly. (1) The Court was of the opinion that section 2(3) contained no absurdities and that in the Act itself there was no indication of inconsistency, hardship or anomaly. (1)

The Court was of the view that the requirement of a document drafted by the testator had been included, in unambiguous language, for good reason, namely to guarantee a degree of reliability by requiring evidence of personal conduct by the testator out of which his or her intention can be clearly deduced. (1)

The requirement of section 2(3) is that there must be a document that was **"drafted or executed"** by the person who has died. Accordingly, if the document was, in fact, **executed** by the testator, it will not matter that it was not personally **drafted** by the testator, and it will be possible to use section 2(3) to give effect to the document if the formalities have not been strictly followed, provided that it can be shown that the testator intended the document to be his or her will. (1) *In casu* the testator had signed the document and had therefore made an attempt at execution. The court will therefore be obliged to order the Master to accept the document as a valid will if it is shown that the last requirement, namely that the testator intended the document to be his will, is complied with.

The most important requirement which has to be satisfied before a court will grant an order in terms of section 2(3) is the requirement that the court has to be satisfied that the testator **intended** the document to be his will. (1) The facts of each case must be considered to ascertain the testator's intention (1) (*Van Wetten v Bosch* 2004 (1) SA 348 (SCA)). (1)

The Supreme Court of Appeal held that for the grant of relief under section 2(3) a court must be satisfied that the deceased person who drafted or executed the document **intended the specific document to be his will, and not merely instructions to an attorney** to draft a will

for him or her. (1) That intention must have existed concurrently with the execution or drafting of the document (see *Van Wetten v Bosch* 2004 (1) SA 348 (SCA)). (1)

On the authority of *Van Wetten v Bosch*, one would argue that the children would be successful in their application based on section 2(3).

(max. 15)
Total Assignment 01: [30]

2 COMMMENTARY ON ASSIGNMENT 02: SEMESTER 02

Question 1

Which one of the following persons will **not** be able to claim maintenance from the deceased in terms of the Maintenance of Surviving Spouses Act 27 of 1990?

[1] The deceased's wife in a monogamous Muslim marriage.
[2] The deceased's wife in a polygamous Muslim marriage.
[3] The deceased's heterosexual life partner.
[4] The deceased's homosexual life partner in a civil union.

See Jamneck en Rautenbach (*J & R*) par 2.5.2 – 2.5.3.

Question 2

Mr X dies intestate and is survived by his grandparents, P and Q on his father's side and his uncle Z on his mother's side only. How will his estate devolve?

[1] Z will inherit one half of the estate and P and Q will share the other half of the estate.
[2] P, Q and Z will each inherit one-third of the estate.
[3] The uncle, Z will inherit the whole estate.
[4] The grandparents, P and Q, will inherit the whole estate

See *J & R* par 2.6.8.

Question 3

According to *Rhode v Stubbs* 2005 (5) SA 104 (SCA) estate massing takes place when...

[1] the surviving testator accepts a benefit in terms of a mutual will, irrespective of the intention of the parties to the mutual will.
[2] a testator in a mutual will disposes of his/her own estate as well as of the estate of the other testator.
[3] testators join their estates or portions of their estates, with the purpose of disposing of the joint unit in a will and the surviving testator then accepts a benefit in terms of the will.
[4] testators married in community of property mutually benefit each other in a mutual will.

J & R par 9.6.

Question 4

T provides in his will:

> "I leave R 20 000 to my daughter, F. She must receive this amount before any other benefit is paid out."

The bequest to F is called …

[1] a modus.
[2] a prelegacy.
[3] an inheritance.
[4] a bequest price.

J & R par 9.3.1 (p 136).

Question 5

When interpreting a will, which of the following sources may NOT be used?

[1] The will itself.
[2] Armchair evidence.
[3] Extrinsic evidence to identify a beneficiary.
[4] Evidence as to a statement made by the testator himself or herself as to what he or she intended.

J & R par 13.4.3.

Question 6

T provided as follows in his will:

> "I leave my farm to my brother, B and I bequeath the residue of my estate to my two sisters, M and N."

T leaves behind his mother, his brother B and his sisters M and N. B refuses to inherit. Who will inherit the farm and why?

[1] The mother, because of section 2C(1) of the Wills Act 7 of 1953.
[2] The sisters because they are the heirs of the residue.
[3] The sisters because accrual takes place.
[4] The mother and the sisters in terms of intestate succession.

J & R par 9.3.1.1 (read with par 10.3.2 and par 10.9).

Question 7

Which one of the following bequests provides an example of a joinder *re et verbis?*

[1] "I bequeath my farm to John and Peter. John is to get the portion which lies north of the river, while Peter is to get the portion which lies south of the river."
[2] "I bequeath my farm to John and Peter."
[3] "I bequeath my farm to John and Peter in equal shares."
[4] "I bequeath my farm to John and my car to Peter."

J & R par 10.9.2.

Question 8

Which one of the following provisions in a will creates a fideicommissary substitution?

[1] "I bequeath my farm to my son, John. If John predeceases me, my son Peter should inherit the farm."
[2] "I bequeath my farm to my sons, John and Peter, in equal shares."
[3] "I bequeath my farm to my son, John. If John dies without children, the farm must go to my son Peter."
[4] "I bequeath the residue of my estate in trust to my sons, John and Peter."

J & R par 10.4.1.2.1.

Question 9

Testator T provides as follows in his will:

> "I leave my estate in trust to my trustee, Mr X. My wife, W, must receive the income from the trust during her lifetime. At her death, my children P and J must receive the capital of the trust."

Who is the owner of the trust property after T's death?

[1] W
[2] X
[3] P and J
[4] W, P and J.

J & R par 11.3 and par 11.7.

Question 10

What is the principle called according to which the executor of an estate must, under certain circumstances, take benefits given to certain heirs by the deceased during his lifetime into account when distributing the estate among certain beneficiaries?

[1] Bequest price
[2] Ademption
[3] Collation
[4] Prelegacy

J & R par 12.1.

Question 11

What is the process called where a court adds, deletes or changes something in a will because the testator had made a mistake when making the will and the will does not reflect his intention correctly?

[1] Rectification
[2] Deletion
[3] Alteration
[4] Ratification

J & R par 13.6.

Question 12

B and C were married in 2000. Shortly thereafter they made a mutual will, indicating that the survivor will inherit everything. Two children, D and S, were born from the marriage. In January 2009 they were divorced and in February 2009 B married W. Two weeks later B died in a car accident without changing his will. Who will inherit B's estate?

[1] C
[2] W
[3] D and S
[4] W, D and S

J & R par 13.3.1.

Question 13

A *pactum successorium* in an antenuptial contract...

[1] is valid in our law.
[2] is invalid in our law.
[3] has to comply with testamentary formalities.
[4] may be revoked in a later will by one of the parties to the contract.

J & R par 14.3.2.2.

Question 14

A *donatio mortis causa*...

[1] is invalid in our law.
[2] is valid if it complies with testamentary formalities.
[3] may not be revoked by the donor.
[4] restricts the freedom of testation of the donor.

J & R par 14.3.2.1.

Question 15

Testator Tom provided as follows in his will:

> "I leave my house to my wife, Wendy. The residue of my estate I bequeath to my sisters, Mary and Nina."

Tom and Wendy were killed in the same car accident. Tom's only surviving relatives were his sisters, Mary and Nina, and his brother Ben. Wendy was survived by her sister, Susan. Who inherited Tom's house?

[1] Wendy, since that was what Tom provided in his will.
[2] Susan, since she inherited the house from Wendy.
[3] Mary and Nina, since they are Tom's testate heirs.
[4] Mary, Nina and Ben, since they are Tom's intestate heirs.

J & R par 1.6.1 (p 14).

TOTAL: [30]

3 INFORMATION ABOUT THE EXAMINATION

To assist you with your preparation for the examination, we provide you with an old examination paper which should be viewed purely as a guide to the types of questions that could be asked. Please note that this does not necessarily mean that the same topics will be covered again in this semester's examination paper. Also note that this paper was set on tutorial material that

became outdated and was replaced by new tutorial material. In short, don't rely on the previous examination paper or any of the older examination papers provided on *myUnisa*.

3.1 STUDY MATERIAL

The study material which you have to study for this examination consists of:

- the prescribed textbook: Jamneck, Rautenbach, Paleker, Van der Linde, Wood-Bodley *The Law of Succession in South Africa* (2009) Oxford University Press Cape Town [Prescribed sections are indicated in your Study Guide]

- the prescribed cases, with the relevant notes in the *Casebook on the Law of Succession* – see the list of cases in Tutorial letter 101/2012

- the tutorial letters

PLEASE NOTE:

(1) **Please do not phone to ask us if you can leave anything out, since there is nothing that you may leave out!** All the information in your Law of Succession study material forms a unit and the relevant sections have been indicated in your Study Guide. You have to know and understand **everything** to be able to answer problem type questions.

(2) No particular part of the work is more important than any other part. In other words, **do not try to "spot" for the examination**! Furthermore, **do not underestimate the amount of material you have to study for this module**.

(3) **Direct questions can be set on the prescribed cases (and the casebook's notes thereon)** in the examination. Many a student who did not pass the examination has admitted afterwards that they did not really study the cases. Do not make the same mistake! Even if, in a particular examination, there is no question on a particular case, **you have to refer to relevant prescribed case law in all your other answers. (An order form for the casebook is attached to Tutorial Letter 101.)**

3.2 FORMAT OF EXAMINATION

Note the following information on the examination:

(1) **The** examination lasts **2 hours** and it counts **100 marks**.

(2) The paper consists of two sections which have to be completed. **Section A contains multiple choice questions** and has to be **answered on a mark-reading sheet**. (It is recommended that you also mark the answers that you choose on the examination paper itself. Should your mark reading sheet were to get lost, we can establish your answers by looking at your examination paper.)

(3) **When answering Section B, you must write the answers on the examination paper**. We leave sufficient open space for you in which to write your answers. You therefore hand in the whole examination paper when you have completed the questions. The space provided for each answer, is an indication of the amount of information needed to answer the question. As students' handwriting may differ in size, however, we usually provide more space than is required.

(4) In Section B, a question may count anything from 1 to 20 marks.

(5) Always **refer to relevant case law** even if the question does not state that you have to do so.

(6) The instructions below are the same as those that will appear on the examination paper. Read them through carefully beforehand so that you do not have to spend time doing so when writing the examination.

(7) You will note that the instructions are in English and Afrikaans. This is also the format throughout the paper. Please ensure that you answer every question and do not accidentally skip over one, thinking that it is only the Afrikaans version of one that you've already answered.

(8) You will be allowed to use a **non-programmable pocket calculator** to do the calculations for the intestate succession questions.

The instructions page of the paper will look as follows:

UNIVERSITY EXAMINATIONS



UNIVERSITEITSEKSAMENS

UNISA university of south africa

PVL2602

(495070)

October/November 2012
Oktober/November 2012

LAW OF SUCCESSION
ERFREG

Duration : 2 Hours
Tydsduur : 2 Uur

100 Marks
100 Punte

EXAMINERS / EKSAMINATORE :

FIRST / EERSTE :	PROF J JAMNECK	PROF A ROOS
SECOND / TWEEDE :	MRS/MEV M WIESE	

Use of a non-programmable pocket calculator is permissible.
Gebruik van 'n nie-programmeerbare sakrekenaar is toelaatbaar.

Closed book examination.
Toeboek eksamen.

This examination question paper remains the property of the University of South Africa and may not be removed from the examination venue.
Hierdie eksamenvraestel bly die eiendom van die Universiteit van Suid-Afrika en mag nie uit die eksamenlokaal verwyder word nie.

INSTRUCTIONS

1. **This paper consists of Section A: Multiple-choice questions (to be answered on the mark-reading sheet) and Section B: Fill-in questions (to be answered on the fill-in question paper)**. You will not receive an examination book.
2. You must hand in the complete examination paper plus the mark-reading sheet.
3. The unique number to be filled-in on the mark-reading sheet is 475441.
4. Answer all the questions in the designated spaces only. Answers outside such spaces will not be read.
5. **Do not write in the margins** - this space is reserved for the examiners.
6. **Do your rough work on page 2.** This page will not be read by the examiners.
7. The English version of each question is followed by the Afrikaans version.
8. This paper counts **100 marks**. Divide your time accordingly.
9. Plan each answer carefully before you write it down and refer to the relevant authority whenever possible.

INSTRUKSIES

1. **Hierdie vraestel bestaan uit Afdeling A: Multikeusevrae (wat op die merkleesblad beantwoord word) en Afdeling B: Invulvrae (wat op die invulvraestel beantwoord word)**. U ontvang geen eksamenboek nie.
2. U moet die hele vraestel inlewer, asook die merkleesblad.
3. Die unieke nommer wat op die merkleesblad ingevul moet word, is 475441.
4. Beantwoord al die vrae net in die ruimtes daarvoor aangedui. Antwoorde buite sodanige ruimtes sal nie gelees word nie.
5. **Moenie in die kantlyne skryf nie** - dié ruimte is vir gebruik deur die eksaminatore.
6. **Doen u rofwerk op bladsy 2.** Dié bladsy sal nie deur die eksaminatore gelees word nie.
7. Die Afrikaanse weergawe van elke vraag volg direk na die Engelse weergawe.
8. Die vraestel tel **100 punte**. Deel u tyd daarvolgens in.
9. Beplan u antwoord deeglik voordat u dit neerskryf en verwys waar moontlik na relevante gesag.

4 OLD EXAMINATION PAPER AND MEMORANDUM

The reason why we include an old examination paper here is for you to see the type of questions that you can expect in the examination. The memorandum gives you an idea of what your answers should entail if you want to pass. **When preparing for the examination, you may find it useful to first answer the questions without looking at the answers.**

In order to conserve paper, we do not include the Afrikaans version of each question or the lines provided for the answers. Also note that in most instances we have provided more facts in the memorandum than would be required. In other words, even if a student does not cover all the facts in the memorandum, he or she may still earn a good mark.

SECTION A

Multiple choice questions [30]

(Assignment 02 provides a good example of these types of questions.)

SECTION B

Question 1

(a) Define the law of succession. (2)

The law of succession is a branch of private law.(1) The law of succession comprises those legal rules or norms which regulate the devolution of a deceased person's property upon one or more persons.(1) Thus the law of succession concerns itself with what happens to a deceased person's estate after his/her death.(1) (max 2)

(b) Distinguish between an "estate" and the "residue of an estate". (4)

The testator's estate consists of the assets (½) and liabilities.(½)

The residue of the estate refers to that part (½) of the deceased's estate which remains after the payment of funeral expenses,(½) administration costs,(½) tax (½) (if any), the testator's debts (½) and the legacies.(½).

(c) X dies intestate and leaves the following relatives:

His wife W to whom he was married in community of property, his son S, his mother M and his full brother B. The total value of the estate is R400 000.

Explain the devolution of X's estate, giving reasons for your calculations. (6)

(1) The joint estate of X and W has to be divided into two halves at X's death in terms of matrimonial property law, since the marriage was in community of property (R400 000 ÷ 2 = R200 000). X's estate amounts to R200 000. (1)
(2) The spouse inherits either a child's share or statutory determined minimum amount of R125 000, whichever is the greater. (1).

(3) A child's share is determined buy dividing the value of the estate by the number of children who either survived the deceased or who predeceased him but are survived by descendants, plus the number of spouses.(1)
(4) Therefore, in this case a child's share is R200 000 ÷ 2 (S + one) = R100 000. (1)
(5) W inherits R125 000 since it is more than R100 000.(1)
(6) S inherits the residue (R 200 000 – R 125 000) = R75 000. (1)
(7) M and B inherit nothing because M is an ascendant and B is a relative in the collateral line and they are excluded by the child and the spouse. (1) (max 6)

(d) X dies intestate and leaves the following relatives:

His wife W and his two sons S and D. X's estate amounts to R450 000. X and W were married out of community of property with the accrual system. X's estate is entitled to R150 000 accrual from W.

Explain the devolution of X's estate giving reasons for your calculations.

(1) X's estate is **entitled** to accrual from W's estate: R450 000 + R150 000 = R600 000. X's deceased estate that has to be divided in terms of intestate succession now amounts to R600 000. (1)
[NB: If **the deceased** was entitled to accrual, the amount is added to his/her estate. If the surviving spouse was entitled to accrual, the amount will have to be deducted from the deceased's estate. It is important to start with the correct amount otherwise you will receive 0 for your answer!]
(2) The surviving spouse is entitled to either a child's share or a statutory determined minimum amount (at present R125 000), whichever is the most. (1)
(3) A child's share is calculated by dividing the value of the estate by the number of children who either survived the deceased or who predeceased him but are survived by descendants, plus the number of spouses. (1)
(4) A child's share is calculated as follows: R600 000 ÷ 3 (S and D plus 1) = R200 000 (1)
(5) The surviving spouse (W) inherits a child's share of R200 000 because it is more than the statutory determined amount of R125 000. (1)
(6) The children (S and D) share the rest (R 600 000 – R 200 000 = R400 000) equally and inherit R 200 000 each. (1) (max 4)

(e) From the following list of names of decided cases, (all of which have been prescribed for this module) you must choose ONE that serves as authority for a particular statement made hereunder, and then write the name of the case underneath the statement.

1 *Barclays Bank DC & O v Anderson* 1959 2 SA 478 (T)
2 *Bekker v Naude* 2003 (5) SA 173 (SCA)
3 *Botha v The Master* 1976 (3) SA 597 (EC)
4 *Casey v The Master* 1992 (4) SA 505 (N)
5 *Ex parte Williams: In re Estate Williams* 2000 (4) SA 168 (T)
6 *Gafin v Kavin* 1980 (3) SA 1104 (W)
7 *Levy v Schwartz* 1948 SA 930 (W)
8 *Pillay v Nagan* 2001 (1) SA 410 (D)
9 *Re Estate Whiting* 1910 TPD 527
10 *Rens v Esselen* 1957 (4) SA 8 (T)

(i) Section 2(3) of the Wills Act 7 of 1953 may only be applied if the deceased has personally drafted or executed the particular document. (1)
Bekker v Naude 2003 (5) SA 173 (SCA)

(ii) A will may be rectified by the insertion of words. (1)
Botha v The Master 1976 (3) SA 597 (OK)

(iii) A condition in a will, which has the effect of breaking up an existing marriage, is valid where such effect is purely incidental and did not form part of the testator's intention. (1)
Barclays Bank DC & O v Anderson 1959 2 SA 478 (T)

(iv) A person who negligently caused the death of the testator may not inherit from the testator. (1)
Casey v The Master 1992 (4) SA 505 (N)

[20]

Question 2

2.1 Discuss the importance of *Rhode v Stubbs* 2005 (5) SA 104 (SCA) with regard to massing.
[Do not discuss the facts of the case. Only discuss the importance of the case.]
(5)

(1) According to our common law rules of interpretation, when interpreting a joint or mutual will of parties married in community of property, one has to start off on the premise that one is dealing with two separate wills of the parties, until the contrary becomes clear.
(2) This rule results from the common law rule that no one can deprive himself of the power to freely make a last will.
(3) A testator can, by means of massing, deprive himself of his power to make a will, but if there is any uncertainty about his intention, the will should be interpreted in a manner that will allow the greatest possible measure of freedom of testation.
(4) This gives rise to the subsidiary rule of interpretation, namely the presumption against massing, which applies when the golden rule of interpretation, namely to give meaning to the testator's words within the framework of the will, cannot be applied because the words are unclear or subject to more than one interpretation.
(5) For massing to take place, it is necessary for one testator to dispose of both his own estate (or a part thereof) and the estate (or a part thereof) of the other testator.
(6) For massing to take effect, the surviving beneficiary must adiate a benefit under the mutual will.
(7) If massing was not intended, acceptance of the benefits from a mutual will cannot in itself bring about massing.

2.2 Discuss the use of the will itself as source of interpretation when establishing the testator's intention. (10)

(1) The first step when interpreting a will is to determine the testator's intention as it appears from his will read as a whole. (1).
(2) Next, the court must give to the words the ordinary grammatical and everyday meaning which they had at the time of the making of the will unless it appears from the context that the testator used the words in another meaning (1).

(3) The court must attach the technical meaning to words unless it is apparent from the context that the testator used them in another sense. (1)
(4) Where words have a technical as well as an ordinary meaning, they must be given their ordinary meaning unless it is clear from the will that the other meaning is intended (1).
(5) Where the same word is found more than once in the will, there is a rebuttable presumption that the testator used it in the same sense every time unless the contrary is apparent from the will. (1)
(6) If a word or expression in a will is capable of bearing more than one meaning, the court must attach to it the meaning which will make it valid rather than invalid, or according to which it will make sense instead of nonsense, or according to which the beneficiaries will benefit rather than be placed under an obligation or prejudiced (1).
(7) Where contradictory words, expressions or provisions appear in a will, an attempt must be made to reconcile them with one another or with the general intention of the testator as it appears from the will read as a whole (1).
(8) It must also be borne in mind that if one of the provisions is the dominating clause in the will and nominates a beneficiary or makes a bequest, full effect must be given to it unless it is apparent from the rest of the will that the testator wished to qualify it (1).
(9) It may sometimes be necessary to give effect to the testator's intention without paying attention to certain words in the will. This is the case where these words do not reflect the clear intention of the testator (1).
(10) It may even be necessary to add words in order to complete a sentence or to give effect to the testator's intention where the testator has obviously omitted words from his will. This is called rectification. (1)
(11) The court may, however, only deduce or imply a provision, bequest or disposition in a will where it is a necessary implication and obviously in accordance with the contents of the will (1).
(12) In the interpretation of wills attention must be paid to punctuation and to the arrangement of the paragraphs in the will, since these may be a valuable aid in interpretation. They may even be the deciding factor in the preference of one interpretation to another. The value of the punctuation will, however, depend on the circumstances of the case concerned (1).
(13) The court may also take into account the fact that a will was made by a layman, an inexperienced draftsman or an experienced draftsman (1). (max 10)

2.3 Discuss briefly the court's statutory power to remove a fideicommissum on immovable property. (5)

(1) In terms of the Immovable Property (Removal of Restrictions) Act 94 of 1965 (1) the court has the power to remove restrictions (including *fideicommissa)* on immovable property in the following circumstances:
(2) Where a beneficiary who has an interest in immovable property which is subject to a restriction imposed by will or other instrument apply to court for removal or modification of the restriction, on the ground that such removal or modification will be to the advantage of any beneficiaries, present or future, born or unborn, certain or uncertain.(1)
(3) If the court finds that the shares of the immovable property are too small for beneficial occupation,(1)
(4) or because beneficial use is prevented by a prohibition against subdivision,(1) or
(5) because circumstances have arisen which the testator did not foresee, (1)
(6) or if it will be in the public interest or in the interests of the beneficiaries (1) (max 5)

Total [20]

Question 3

3.1 Read the following set of facts and then answer the questions that follow:

Mary and John are siblings. In his will John appointed his sister Mary to inherit his whole estate. In her will Mary appointed her husband Peter to be her heir. Mary and John are killed in the same car accident, and no evidence exists as to who died first. John leaves behind both his parents. Mary leaves behind her parents and her husband Peter.

(a) Who will inherit John and Mary's respective estates? Briefly explain your answer.
When two people die in the same disaster and it is not possible to establish who died first, the court will find that they died simultaneously.(1) *Ex parte Graham* (1) held that in our law no presumption as to the order of death exists.(1) That means that two persons who die in the same accident, cannot inherit from each other, because one has to survive a person to be able to inherit from him/her.(1) John's will cannot be given effect to because Mary cannot inherit from him.(1) John's estate will therefore devolve in terms of the law of intestate succession (1) and his mother and father will inherit his estate. (1) Mary is survived by her husband and he will inherit her estate in terms of her will. (1) (max 7)

(b) Would it have made a difference to your answer if John died at the scene of the accident and Mary died two hours later in hospital? Briefly explain your answer. (3)

Yes. If Mary survived John, she would have inherited John's estate as indicated in his will (1), and her husband would then have inherited both her and John's estates as John's estate would have formed part of her estate. (1). John's parents would then not have inherited. (1)

3.2 T's valid will contains the following bequest:

"I leave my farm to my son S. Should he ever leave the farm permanently, the farm has to go to my brother, B."

T dies in June 1993, leaving his wife W, his son S, S's son D and T's brother B.

Explain whether the following legal concepts are applicable giving reasons for your answers. Apply those that are applicable to the above facts and indicate when *dies cedit* and *dies venit* take place for each of the parties.

(a) Resolutive condition (3)

This provision contains a resolutive condition for the son, S.(1) His rights will terminate (1) if an uncertain future event (leaving the farm) takes place.(1) *Dies cedit* and *dies venit* take place for S on T's death.(1)

(b) Modus (3)

A modus is an obligation or qualification added to a bequest. (1) It has no effect on vesting of rights (1). It is not applicable in this instance. (1).

(c) Direct substitution (3)

Direct substitution occurs where the testator names a series (two or more) of beneficiaries to inherit in the alternative (1). When the first one inherits, the substitute has no hope of ever inheriting. (1) It is not applicable in this set of facts as the beneficiaries inherit one after the other. (1)

(d) Fideicommissary substitution (6)

Fideicommissary substitution takes place where a testator nominates beneficiaries to inherit one after the other (1). The first beneficiary is called the fiduciary and the next beneficiary is called the fideicommissary (1).The fiduciary has to pass the benefit to the fideicommissary on the happening of an uncertain future event (in case of a condition, as in this case) (1). It is applicable in this case (1) as the farm will pass from S to B, according to the express *fideicommissum*.(1) A *fideicommissum tacitum* in favour of D may also be read into the provision (*Galliers* and *du Plessis* cases) (1). *Dies cedit* and *dies venit* take place for S on T's death.(1) *Dies cedit* and *dies venit* are postponed for B until S leaves the farm.(1)

3.3 Manu and Vera were married on 10 January 1990 and were divorced on 12 May 2007. They had two children, Bongani and Chris. Manu died in a car accident on 29 July 2007. Manu's valid will (which he made in 1991) provided that Vera, Bongani, Chris and his secretary, Sarah, inherit his entire estate.

(a) Write down the names of the persons who were to inherit Manu's estate. (2)

Bongani, Chris, Sarah (1) (You would not have received any marks, had you included the ex-wife.) (1)

(b) Give a reason for your answer. (3)

The Wills Act provides (1) that if the testator dies within 3 months of his/her divorce (1), the previous spouse does not inherit in terms of the will. (1)

Total [30]

Total section B [70]
TOTAL [100]

5 CHANGE IN CONTACT DETAILS FOR PROF ROOS

In tutorial Letter 101 we mention a cell phone number for Prof Roos. This number has changed and you should not use it anymore. To contact Prof Roos, you must dial her office telephone number and your call will then automatically be transfered to her new cell phone number. Please note that any call to the landlines of Prof Roos and Prof Jamneck is automatically transferred to their cell phones and will consequently ring longer before it is answered. It will, however, be answered either personally by the lecturer or by an answering machine – therefore do not disconnect your call before it is answered.

6 CONCLUSION

We wish you success in your studies this semester. Remember that all the tutorial letters are available in electronic format on *my*Unisa. Have a look at the webpage of this module on *my*Unisa and take part in the Discussion Forum.

PROF J JAMNECK Telephone number: 012 429-8506
072 522 4810
PROF A ROOS 012 429-8422
MR PO MATSEMELA 012 429-8392

ADDENDUM

LLB ELECTIVE MODULES IN DEPARTMENT OF PRIVATE LAW

In the LLB degree students can register for 5 elective LLB modules from any department in the College of Law. In the Department of Private Law the following electives are presented:

LPL4801- Law of Sale and Lease

This module will prove useful to students interested in commercial contracts and a career dealing with such contracts in some or other manner. It deals with the common law of sale and lease, as well as the implications of legislation that impacts on these agreements (the Alienation of Land Act 68 of 1989; the National Credit Act 34 of 2005; the Consumer Protection Act 68 of 2008; and the Rental Housing Act 50 of 1999). There are three guides dealing with the module content as well as a reader with prescribed cases. All the study material is provided by Unisa to the student. Contact Prof CJ Pretorius for more information (pretocj1@unisa.ac.za / 012 429-8502).

LPL4802- Law of Damages

This module is presented fully online in English only. This means that students must have access to the internet and a computer to be able to register for this module. Access to the internet need not be continuous, but should be available at least once a week for approximately 2 hours. Registration fees for online modules are less than paper-based modules. The Law of Damages is a practical module and indispensable for students wanting to practice law, especially in civil law. In this module students are equipped with the necessary skills and knowledge to advise clients on the amount of damages they could claim in a civil suit. The prescribed textbook is in e-book format and the learning units are available on *my*Unisa. The assessment is done online and the final summative assessment will be in the form of a portfolio to be completed during the start of the examination period. **No** venue-based written exam required. Contact Prof L Steynberg for more information – steynl@unisa.ac.za or 012 429-8624.

LPL4803- Third Party Compensation Law

A motor vehicle accident in South Africa is unfortunately a common sight and experience. The term “third party” refers to a road accident victim who has suffered personal injury or loss due to the death of his or her breadwinner as a result of the unlawful and negligent driving of a motor vehicle within the borders of South Africa. The Road Accident Fund is an entity created by statute which usually steps into the shoes of the wrongdoer driver and compensates third party claimants. Any legal practitioner who intends dealing with a claim for damages for personal injuries or other loss arising from motor vehicle accidents, must possess knowledge of both statutory law and common law principles regulating third party claims. This area of the law is constantly evolving as a result of the continuous and constant litigation taking place in our courts, making this subject practical and relevant. The purpose of this module is to equip you with knowledge of and insight into the law of third party compensation thereby enabling you to practice this field of law. You are expected to effectively apply your knowledge, display your basic research skills and propose solutions to practical situations. A prerequisite for enrolment is

successful completion of, or simultaneous enrolment for the Law of Delict. This module is presented only in English. For more information contact Mrs R Ahmed on 012 429 8321/ ahmedr@unisa.ac.za or Prof M Mokotong on 012 429-8424/ mokotmm@unisa.ac.za.

LPL4804- Conveyancing

Are you looking for an elective subject to prepare you for attorneys' practice? Are you interested in the registration of real rights in immovable property? THEN CHOOSE CONVEYANCING (LPL4804) AS AN LLB ELECTIVE!

What is CONVEYANCING?

The module is designed to equip students with professional competence and research skills in conveyancing law, particularly relating to the drafting, evaluation and registration of conventional deeds required for the lawful creation and transfer of ownership and other real rights in land in South Africa. The conveyancing section is generally one of the most lucrative and specialized departments in an attorneys' practice. Students will find this elective practical, topical and particularly appropriate near the end of their studies as they start preparing for work in a legal practice. A prerequisite for enrolment is successful completion of, or simultaneous enrolment for Law of Property. Contact Ms D Ramwell for more information – ramwed@unisa.ac.za or 012 429-8834.

LPL4805- Notarial practice

Are you looking for a specialization field to prepare you for practice? Are you interested in the drafting, execution and registration of real rights? THEN CHOOSE NOTARIAL PRACTICE (LPL4805) AS AN LLB ELECTIVE!

What is NOTARIAL PRACTICE?

The notary is a specialized attorney. Specific legal work is reserved for notaries, where particular emphasis is placed on qualities such as responsibility, credibility, impartiality and professional integrity. The module is designed to equip students with professional competence and research skills relating to the drafting, execution and registration of the notarial contracts, for example notarial bonds, powers of attorney, antenuptial contracts, long term leases, servitudes and authentication of documents. We trust that students will find this elective practical, topical and particularly appropriate near the end of their studies as they start preparing for practice. A prerequisite for enrolment is successful completion of, or simultaneous enrolment for Law of Property. Contact Ms TH Tivana for more information – tivanth@unisa.ac.za or 012 429-8320.